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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

IN DEFENSE OF ANIMALS;  
DREAMCATCHER WILD HORSE AND  
BURRO SANCTUARY; BARBARA  
CLARKE; CHAD HANSON;  
LINDA HAY,

No. 2:10-cv-01852-MCE-DAD

Plaintiffs,

v.

MEMORANDUM AND ORDER

UNITED STATES DEPARTMENT OF  
THE INTERIOR; BUREAU OF LAND  
MANAGEMENT; KEN SALAZAR,  
Secretary of the United States  
Department of the Interior;  
ROBERT ABBEY, Director of the  
Bureau of Land Management; KEN  
COLLUM, Acting Field Manager  
of Eagle Lake Field Office,

Defendants.

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Plaintiffs in this action, which consist of an animal rights  
group along with a wild horse and burro sanctuary and other  
concerned individuals, seek through this Motion to halt a planned  
"gather", or round-up, of wild horses and burros scheduled to  
commence on August 9, 2010 at the Twin Peaks Herd Management Area  
("HMA").

1 Plaintiffs argue that the planned gather runs counter to the  
2 congressional mandate for preserving wild horses and burros as  
3 set forth in Wild Free-Roaming Horses and Burros Act, 16 U.S.C.  
4 § 1331, et seq. ("Act"). Plaintiffs also contend that the  
5 provisions of the National Environmental Policy Act ("NEPA") have  
6 been violated because the Environmental Assessment ("EA") for the  
7 gather fails to adequately analyze a reasonable range of  
8 alternatives, fails to ensure scientific integrity and dissenting  
9 opinion, and consequently fails to take the requisite "hard look"  
10 at the proposed action for NEPA purposes. Instead, according to  
11 Plaintiffs, because of the cumulative impacts occasioned by the  
12 gather and its unprecedented scope, at a minimum the Court should  
13 require that a comprehensive Environmental Impact Statement  
14 ("EIS") be prepared before the gather moves forward.

15 While Plaintiffs' Motion is styled as a request for both a  
16 temporary restraining order and a preliminary injunction, because  
17 the Motion has been fully briefed and since extensive oral  
18 argument was heard on the matter at the time of the August 5,  
19 2010 hearing, the Court believes it is appropriate to consider  
20 the matter as a preliminary injunction and analyze the instant  
21 Motion under that standard.<sup>1</sup>

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24 <sup>1</sup> Plaintiffs' counsel contended at oral argument that a  
25 temporary restraining order could be based upon a showing of  
26 immediate and irreparable harm to the Plaintiffs, alone, citing  
27 Federal Rule of Civil Procedure 65(b). Rule 65(b), however, by  
28 its terms applies only to the issuance of a temporary restraining  
order without notice, and before the adverse party can be heard  
in opposition. That is not the situation here, where the case  
has been fully briefed and argued on a schedule stipulated to by  
the parties.

1 At the close of the August 5, 2010 hearing, the Court denied  
2 Plaintiffs' request for injunctive relief from the bench. This  
3 Memorandum and Order, as promised following the hearing,  
4 reiterates that denial in further detail.

5  
6 **BACKGROUND**  
7

8 The Twin Peaks HMA comprises some 789,852 acres of public  
9 and private lands on either side of the border between California  
10 and Nevada. Approximately 55 miles long from north to south, and  
11 35 miles wide, slightly more than half of the HMA is located  
12 within Lassen County, California. The remainder is in Washoe  
13 County, Nevada. The Bureau of Land Management ("BLM") designated  
14 the Twin Peaks HMA as suitable for the long-term maintenance of  
15 wild horses and burros in 1981. The Cal Neva Management  
16 Framework Plan established a multiple use balance between  
17 livestock, wild horses, and wildlife in 1982.

18 The population of wild horses and burros within the HMA has  
19 increased sharply since the first aerial population inventory was  
20 conducted in 1973. At that time, 835 horses and 104 burros were  
21 recorded. By 1977, the population was estimated to be at  
22 approximately 3,000 horses. Because wild horses have few natural  
23 predators and are a long-lived species, and since documented foal  
24 survival rates exceed 95 percent, their population levels rise  
25 quickly. Even though nine gathers within the Twin Peaks HMA have  
26 taken place since 1998, the estimated horse population has  
27 nonetheless almost doubled since 2004. During the same period,  
28 burro numbers have risen from 74 to more than 280 animals.

1 A direct count aerial population inventory taken in  
2 September of 2008 revealed some 1,599 horses and 210 burros. At  
3 the time the EA at issue in these proceedings was prepared in  
4 2010, the current population was estimated to be 2,303 horses and  
5 282 burros, based on a 20 percent horse foal crop per year and a  
6 16 percent burro foal yield. Since the EA was prepared, and in  
7 preparation for the anticipated gather of excess horses and  
8 burros to begin on August 9, the BLM conducted another aerial  
9 population inventory on July 26, 2010. That inventory yielded a  
10 count of 2,236 wild horses and 205 burros, numbers slightly less,  
11 but not appreciably lower, than the projected figures,  
12 particularly with respect to the horses.

13 The appropriate management level ("AML") for the Twin Peaks  
14 HMA has been established as a population range of between 448 and  
15 758 wild horses and between 72 and 116 burros. The AMLs are  
16 designed to ensure a thriving natural ecological balance  
17 consistent with multiple use objectives for the HMA. The BLM  
18 strives to remove animals from the HMA population if numbers  
19 exceed the established AML range. Based on the above numbers,  
20 the EA estimated that there were some 1,855 horses in excess of  
21 the AML lower limit, and 210 excess wild burros. Compounding the  
22 situation, according to the BLM, is the fact that wild horses  
23 exceed the forage allocated to their use by 3 to 5 times, since  
24 they graze constantly throughout the year. Livestock, on the  
25 other hand, which are moved from place to place, average only  
26 some 59 percent for cattle and 32 percent for sheep of their  
27 allocated usage.

28 ///

1 While range conditions (both water sources and vegetation) still  
2 remain acceptable, the BLM believes that decreasing the numbers  
3 of horses and burros is essential to avoid unduly depleting  
4 available resources in the long run, especially since their  
5 numbers increase so rapidly if left unchecked.

6 In order to trim current horse and burro populations to  
7 appropriate levels, the BLM has proposed that an attempt be made  
8 to gather the entire population of horses and burros within the  
9 HMA. Since previous gathers have typically rounded up only 80 to  
10 90 percent of the animals, depending on the numbers actually  
11 retrieved, the EA estimates that about 180 horses will be  
12 released after the gather. The released horses would have a sex  
13 ration of 60:40 studs to mares in order to help curb future  
14 population increases, in addition, some or all of the released  
15 mares (depending on the capture rates) would receive fertility  
16 control treatments (an immunocontraceptive known as Porcine Zona  
17 Pellucida, or PZP) designed to reduce their fecundity over the  
18 following two-year period. The BLM's goal, consistent with the  
19 low range of the established ALMs, is to ultimately leave  
20 approximately 450 horses and 72 burros in the HMA.

21 The proposed gather, originally set to commence on August 9,  
22 2010, is expected to take approximately 45 to 60 days to  
23 complete. A helicopter drive method of capture is envisioned,  
24 whereby low flying helicopters steer the animals into capture  
25 sites, where they will be kept for up to one hour before being  
26 transported to temporary holding facilities. Some roping from  
27 horseback is also expected.

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1 According to the EA, the gather would proceed at a slow pace,  
2 with animals moving at either a walk or slow trot.<sup>2</sup> Depending on  
3 temperature conditions, if heat stress is deemed to be a risk  
4 factor, gather operations would be conducted during the cooler  
5 parts of the day. Electrolytes would be added to the drinking  
6 water in holding areas in order to combat dehydration, and the  
7 horses would be provided "good quality" hay.

8         Once gathered, the horses would be segregated so that any  
9 removed animals would be younger, and hence more adoptable in the  
10 long run. Sick or disabled horses would be euthanized, and  
11 horses selected for release back on the range would be evaluated  
12 for sex and other desired herd characteristics like body  
13 condition class, color, size and disposition.

14         Ultimately, the excess animals will be transferred to BLM-  
15 managed holding facilities in the Midwest, from which adoption  
16 may occur. By all indications, those storage facilities are  
17 spacious with ample room for the animals. They are located on  
18 private land.

19         Plaintiffs object to the proposed gather as both inhumane  
20 and in direct contravention of the Act. They claim that the EA  
21 does not properly identify and categorize excess animals prior to  
22 capture, and further allege that herding horses and burros during  
23 the summer August heat imposes an unacceptable strain on the  
24 animals.

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28         <sup>2</sup> This is contrary to Plaintiffs' repeated description of  
the round-up as a "stampede".

1 They further contend that the BLM has not adequately shown that  
2 HMA resources are being overtaxed by the current population of  
3 horses to the extent that there are indeed excess animals. In  
4 addition, Plaintiffs allege that the EA does not properly analyze  
5 the combined effect of so many animals being gathered, along with  
6 the impact that widespread contraception will have on the animals  
7 and their social characteristics. By failing to adequately  
8 address those issues, Plaintiffs claim that the EA runs afoul of  
9 APA's mandate that a "hard look" be taken prior to any  
10 significant environmental action. Absent that hard look, and  
11 given the claimed violations of the Act, Plaintiffs ask that the  
12 Court prevent the August 9, 2010 gather from proceeding.

#### 14 STANDARD

15  
16 The issuance of a preliminary injunctive relief is an  
17 extraordinary remedy, and Plaintiffs have the burden of proving  
18 the propriety of such a remedy by clear and convincing evidence.  
19 See Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); Granny Goose  
20 Foods, Inc. v. Teamsters, 415 U.S. 423, 442 (1974). Following  
21 the Supreme Court's decision in Winter v. Natural Resources  
22 Defense Council, 129 S. Ct. 365 (2008), the party requesting such  
23 relief must show that "he is likely to succeed on the merits,  
24 that he is likely to suffer irreparable harm in the absence of  
25 preliminary relief, that the balance of equities tips in his  
26 favor, and that an injunction is in the public interest."  
27 Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009)  
28 (quoting Winter, 129 S. Ct. at 374.

1 Alternatively, under the so-called sliding scale approach, as  
2 long as the Plaintiffs demonstrate the requisite likelihood of  
3 irreparable harm and show that an injunction is in the public  
4 interest, a preliminary injunction can still issue so long as  
5 serious questions going to the merits are raised and the balance  
6 of hardships tips sharply in Plaintiffs' favor. Alliance for  
7 Wild Rockies v. Cottrell, 2010 WL 2926463 at \*4-7 (9th Cir. July  
8 28, 2010) (finding that sliding scale test for issuance of  
9 preliminary injunctive relief remains viable after Winter).

10  
11 **ANALYSIS**

12 **A. Likelihood of Success on the Merits**

13 **1. Violations of the Act**

14  
15 In enacting the Wild Free-Roaming Horses and Burros Act,  
16 Congress found that wild horses, as "living symbols of the  
17 historic and pioneer spirit of the West", were to be "protected  
18 from capture, branding, harassment or death", and as such were to  
19 be considered an "integral part" of public lands in areas where  
20 they were presently found. 16 U.S.C. § 1331. The BLM, as  
21 designate of the Secretary of Interior, is directed to accomplish  
22 this by maintaining "specific ranges on public lands as  
23 sanctuaries for their protection and preservation." Id. at  
24 § 1333(a). In managing such HMAs, the BLM must "maintain a  
25 current inventory of wild-free roaming horses and burros on given  
26 areas of the public lands." Id. at § 1333(b). As Congress  
27 explained,

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1 "The purpose of such inventory shall be to: make  
2 determinations as to whether and where an  
3 overpopulation exists and whether action should be  
4 taken to remove excess animals; determine appropriate  
5 management levels of free-roaming horses and burros on  
6 these areas of the public lands; and determine whether  
7 appropriate management levels should be achieved by the  
8 removal or destruction of excess animals, or other  
9 options (such as sterilization, or natural controls on  
10 population)."

11 Id.

12 In managing HMAs, Congress went on to provide that "all  
13 management activities shall be at the minimal feasible level..."

14 Id. at § 1333(a). Despite that admonition, the Act goes on to  
15 unequivocally provide that if the current population inventory  
16 for an HMA reveals that overpopulation exists, and if the BLM  
17 determines that "action is necessary to remove excess animals",  
18 it "shall immediately remove excess animals from the range so as  
19 to achieve appropriate management levels." Id. at § 1333(b) (2).

20 In removing excess animals, the Act proceeds to prescribe an  
21 order in which animals should be removed, starting with old, sick  
22 or lame animals (which should be destroyed in the most humane  
23 manner possible), then proceeding to adoptable horses and burros  
24 which can be removed for "private maintenance and care". Id. at  
25 § 1333(b) (2) (A-B). Although the terms of the Act actually  
26 provide that excess animals for which an adoption demand does not  
27 exist should be "destroyed in the most humane and cost efficient  
28 manner possible", in fact Congress has never appropriated funds  
for extermination, as opposed to ongoing maintenance, of excess  
horses even if not adopted. See Defs.' Opp., 27:18-23.

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1 Plaintiffs initially argue that BLM's proposed gather  
2 violates the Act because the animals are not removed according to  
3 the priority established by § 1333(b). In attempting to round up  
4 all horses and burros, according to Plaintiffs, BLM ignores the  
5 statutory mandate that old, sick and lame animals be eliminated  
6 first before determining if the number of remaining healthy  
7 animals exceeds viable limits.

8 Despite these arguments, however, an agency like BLM has  
9 considerable discretion on how to carry out the directives of the  
10 Act. Am. Horse Prot. Ass'n v. Watt, 694 F. 2d 1310, 1318 (D.C.  
11 Cir. 1982); Am. Horse Prot. Ass'n v. Frizzell, 403 F. Supp. 1206,  
12 1217 (D. Nev. 1975) (denying preliminary injunction request and  
13 allowing wild horse gather to proceed after noting that BLM must  
14 be afforded a "high degree of discretionary authority" in  
15 managing herds). Culling disabled animals from a more  
16 comprehensively captured group of horses and burros is a method  
17 falling within BLM's discretion. Indeed, it is difficult to  
18 imagine from a pragmatic viewpoint how the vetting process could  
19 proceed on the range, as Plaintiffs advocate, rather than through  
20 some capture process. In its Defense of Animals v. Salazar  
21 opinion, the District of Columbia Court of Appeals rejected a  
22 similar argument, stating as follows:

23 "The plaintiffs' interpretation of the Wild Horse Act  
24 is also unpersuasive as a matter of logic. Under the  
25 plaintiffs' reading, no healthy horse may be captured  
26 before all old and infirm horses are destroyed. This  
27 interpretation creates an impossible Catch-22 for the  
28 agency: To evaluate the age and health of a horse, a  
veterinarian must presumably be close to it for a  
significant period of time. A wild horse is unlikely  
to submit to such an inspection voluntarily; it would  
have to be restrained or, more likely, confined- in  
other words, captured.

1 But if, as the plaintiffs contend, the Bureau cannot  
2 capture a healthy horse before euthanizing all  
3 unhealthy ones, and cannot determine whether a horse is  
4 healthy or unhealthy without capturing it, the agency  
5 cannot begin the removal process, despite its statutory  
6 mandate to do so. A statute should not be construed to  
7 produce absurd results. (Citation omitted.) As a  
8 result, the Wild Horse Act cannot logically be read to  
9 forbid the capture of healthy horses prior to the  
10 euthanization of unhealthy ones.”

11 In Defense of Animals v. Salazar, 675 F. Supp. 2d 89, 97-98  
12 (D.D.C. 2009).

13 Importantly, too, the Salazar case goes on to find that  
14 rounding up the vast majority of a herd for sorting does not  
15 “remove” all horses simultaneously from the range, since some of  
16 the horses are ultimately returned to the wild. Id. at 97.  
17 Consequently, contrary to Plaintiffs’ argument, “removal” does  
18 not occur before a determination is made of what horses are in  
19 fact “excess”. Consequently, the Act’s mandate is not  
20 contravened.

21 While Plaintiffs rely heavily on the decision in Colorado  
22 Wild Horse and Burro Coalition v. Salazar, 639 F. Supp. 2d 87  
23 (D.D.C. 2009), that case is inapposite since it involved removal  
24 of all wild horses in the West Douglas Herd Area in Colorado, and  
25 because the BLM in that case had not made an excess determination  
26 due to an overpopulation of horses. Here, on the other hand, the  
27 BLM made a specific determination of just how many animals in the  
28 Twin Rivers HMA are excess, based upon established “appropriate  
management levels” (“AMLs”) and other considerations in promoting  
multiple uses of the federal lands in question.

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1 With respect to what constitutes an appropriate AML, BLM  
2 officials are also afforded significant discretion with respect  
3 to the wild horse and burro populations they manage. See  
4 16 U.S.C. § 1333(b). According to the BLM, the AMLs in question  
5 here have been developed over the course of many years<sup>3</sup> in order  
6 to not only maintain a thriving natural ecological balance on the  
7 range, as the Act mandates, but also to maintain that balance in  
8 the long run, as the Act just as clear requires. See id. The  
9 BLM has determined that even if some of the HMA's resources are  
10 not currently taxed by the existing horse and burros numbers,  
11 they soon will be given the animals' rapidly increasing  
12 populations. The Bureau's determinations in that regard are  
13 entitled to deference.

14 While Plaintiffs also claim that horse and burro populations  
15 should be given priority within the HMA, and that a greater share  
16 of available resources (and presumably different AMLs) should be  
17 allocated to them as opposed to cattle or other livestock, that  
18 argument fails. First, to the extent that Plaintiffs propose  
19 that the multi-use parameters for the HMA be changed, such a  
20 change cannot be made within the confines of this action.  
21 Rangeland stewardship is established through periodically  
22 prepared resource management plans. See 43 U.S.C. § 1712;  
23 43 C.F.R. Part 1600.

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26 <sup>3</sup> Applicable AMLs were established for the Twin Peaks HMA in  
27 1998 pursuant to a research management plan resulting from an  
28 extensive administrative process. The propriety of those ALMs  
has since been periodically revisited. See EA, Ex. 2 to Zahedi  
Decl., pp. 10-11.

1 The resource management plan applicable to the Twin Rivers HMA  
2 was last revised in 2008, after more than for years of public  
3 input and analysis. See Haug Decl., ¶ 24. Any challenge to how  
4 range use is allocated must be made pursuant to the Federal Land  
5 Policy and Management Act, 43 U.S.C. § 1701, et seq., and not  
6 through the Wild Free-Roaming Horses and Burros Act.

7 Plaintiffs' argument that the HMA must be managed  
8 "principally" for wild horse and burro use is also unpersuasive.  
9 16 U.S.C. § 1333(c), however, enacted in 1971, states only that  
10 ranges should be "devoted principally but not necessarily  
11 exclusively to horse and burro welfare in keeping with the  
12 multiple-use management concept for the public lands." Although  
13 even this language does not mandate that only horse and burro  
14 interests be considered, in 1978 Congress amended the act to make  
15 it clear that BLM must strive for a balance that meets the needs  
16 of all range users. As the D.C. Circuit explained,

17 "The main thrust of the 1978 amendments is to cut back  
18 on the protection the Act affords wild horses, and to  
19 reemphasize other uses of the natural resources wild  
20 horses consume. The amendments introduce a definition  
21 of 'excess' horses: horses are in 'excess' if they  
'must be removed from an area in order to preserve and  
maintain a thriving natural ecological balance and  
multiple-use relationship in that area.'"

22 Am. Horse Prot. Ass'n Inc. v. Watt, 694 F.2d 1310, 1316 (D.C.  
23 Cir. 1982) (citing 16 U.S.C. § 1332(f)).

24 The legislative history underlying the 1978 amendments  
25 further illuminates Congress' intent:

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1 "The goal of wild horse and burro management, as with  
2 all range management programs, should be to maintain a  
3 thriving ecological balance between wild horse and  
4 burro populations, wildlife, livestock and vegetation,  
and to protect the range from the deterioration  
associated with overpopulation of wild horses and  
burros."

5 Conference Report 95-1737, October 6, 1978 to accompany H.R.  
6 10587, Public Rangelands Improvement Act of 1978. The Act should  
7 consequently not be viewed as requiring that the BLM increase the  
8 numbers of horses, or give wild horses priority over other users.  
9 See Fallini v. Hodel, 725 F. Supp. 1113, 1118 (D. Nev. 1989)

10 (holding that the Act does not give horses higher status than  
11 cattle on public lands). Instead, the focus of the Act is  
12 rightly viewed as protecting wild horse herds as one component of  
13 multiple species, and many users, sharing a common environment.

14 Plaintiffs also point to the Act's mandate that the BLM's  
15 management of horses and burros be at a "minimal feasible level"  
16 in arguing that the gather proposed here be enjoined. That  
17 language, however, taken from § 1333(a), must be read in  
18 conjunction with the equally clear directive that the Bureau  
19 adopt a multiple-use management program, as set forth in  
20 §1332(c). As already noted above, horse populations in the HMA  
21 have increased dramatically in recent years, and has  
22 approximately doubled since 2004, despite numerous gathers. Left  
23 unchecked, it appears the horse population could increase as much  
24 as 25 percent annually. See Haug Decl., ¶¶ 34-35. The BLM has  
25 already established that current populations within the HMA  
26 exceed appropriate management levels by more than five fold at  
27 the low range and by more than three times at the high end of the  
28 spectrum.

1 Left unchecked, the wild horse population would likely exceed  
2 7,000 after ten years and could reach up to 19,624 horses. EA at  
3 86. Given the clear statutory mandate that "excess" horses be  
4 removed, the proposed gather does not run afoul of the  
5 requirement that only "minimal" management be employed.  
6 Moreover, given the burgeoning population, efforts to slow  
7 reproduction (and the need to remove excess horses in the future)  
8 through immunocontraceptives administered to released mares, and  
9 through a skewed sex ratio of mares to stallions, is also within  
10 the Act's purview given the circumstances of this case. As the  
11 BLM pointed out during oral argument, efforts to bring  
12 populations down to sustainable levels now will in the long run  
13 amount to less, not more, interference and more minimal  
14 management activities for the animals.

15 Plaintiffs fare no better in arguing that the planned  
16 storage and transport of wild horses to BLM long-term holding  
17 facilities is illegal under the Act. While 16 U.S.C. § 1339 does  
18 prohibit BLM from relocating wild horses and burros "to areas of  
19 the public lands where they do not presently exist", the Act is  
20 silent with respect to private lands. Since the BLM is also  
21 barred by an appropriations statute from euthanizing healthy  
22 excess horses (see EA, p. 91), relocation to private facilities  
23 is necessary given the Act's mandate that excess horses be  
24 removed. Significantly, as the government points out, Congress  
25 has repeatedly provided funding to BLM for the operation of  
26 facilities to house excess animals on private lands.

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1 As *amicus curiae* Safari International delineates on page 8 of  
2 their brief, those designated holding areas are in fact thousands  
3 of acres in size and would appear to afford ample room to the  
4 horses and burros in question.

5 In sum, for all the above reasons, the Court does not find  
6 that Plaintiffs are likely to prevail on the merits of their  
7 claims that the provisions of the Wild Free-Roaming Horses and  
8 Burros Act have been violated.

9  
10 **2. NEPA Violations**

11  
12 In addition to arguing that the proposed gather violates the  
13 Wild Horses Act, Plaintiff also claims that the gather's  
14 underlying EA runs counter to the provisions of NEPA, since it  
15 failed to take the requisite "hard look" at the environmental  
16 impact of the action. See Kleppe v. Sierra Club, 427 U.S. 390,  
17 410 n. 21 (1976). Not every action, however, requires a  
18 comprehensive EIS, however; rather, if the agency concludes that  
19 there will be no significant environmental impact on the basis of  
20 a less detailed EA, it can issue a Finding of No Significant  
21 Impact, as the BLM did here on the basis of the 158-page EA that  
22 was prepared. The Court's review of the EA under NEPA should be  
23 limited to whether the BLM took a hard look at the environmental  
24 consequences of the gather; it must not substitute its own  
25 judgment for that of the agency. See Okanogan Highlands Alliance  
26 v. Williams, 236 F.3d 468, 473 (9th Cir. 2000) (citing Kleppe,  
27 supra).

28 ///



1 While Plaintiffs claim that the EA failed to consider  
2 sufficient alternatives to its proposed gather plan, a review of  
3 such alternatives is governed by a "rule of reason" commensurate  
4 with the EA's statement of purpose and need. See City of Carmel-  
5 By-The-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1156 (9th  
6 Cir. 1997). As set forth above, given the rapidly increasing  
7 horse and wild burro population and the BLM's obligation to  
8 consider other range users in addition to the horses and burros,  
9 it appears clear that given the established ALM range for the  
10 animals, wild horses and burros presently exceed recommended  
11 levels by between three and five times. While the agency did  
12 eliminate serious consideration of options that did nothing to  
13 decrease horse and burro population, since that corresponded  
14 neither with their objective or the statutory mandate that excess  
15 animals be removed, it did look seriously at four different  
16 alternatives before settling on the proposed action. Plaintiffs  
17 have not demonstrated that they are likely to prevail on a NEPA  
18 alternatives claim given these circumstances.

19 Plaintiffs also claim that the subject EA is lacking  
20 scientifically and fails to adequately respond to dissenting  
21 scientific opinion. Examination of the lengthy EA, however,  
22 indicates that all aspects of the proposed gather were carefully  
23 considered. While Plaintiffs take particular aim at the plan to  
24 skew the sex ratio of released animals to 60 percent male, and  
25 inject some mares with immunocontraceptives, those actions will  
26 not apply to animals not gathered (typically a capture rate of  
27 only about 80 percent is achieved).

28 ///

1 Moreover, the EA explains in detail why those measures were  
2 necessary to help curb further population increase. The EA  
3 determined, for example, that the PZP contraception is completely  
4 reversible, meets BLM requirements for safety to mares and to the  
5 environment, and can be easily administered in the field. EA,  
6 p. 93. It also disclosed the impacts of the PZP contraceptive  
7 vaccine. Id. at 92-93. At least one district court has found  
8 that the PZP contraceptives in question are not so uncertain as  
9 to require an EIS. Cloud Foundation v. Kempthorne, 2008 WL  
10 2794741 at \*9 (D. Mont. 2008). According to the Declaration of  
11 Albert J. Kane, a Senior Staff Veterinarian for the United States  
12 Department of Agriculture who also serves as an adviser to the  
13 BLM's Wild Horse and Burro program on matters related to animal  
14 care, PZP treatments have been administered to free roaming wild  
15 horses since the 1990's, and since 2004, the BLM has safely  
16 administered over 2,700 doses of the vaccine in over 75 herd  
17 management areas, with no evidence of the treatment having any  
18 effect on population ecology. Kane Decl., ¶ 28. Moreover, in  
19 the scientific studies identified by Plaintiffs as questioning  
20 the safety of PZP, repeated administration of the vaccine appears  
21 to have been the issue. That concern was underscored by  
22 Plaintiffs at oral argument. Here, it appears that the animals  
23 on the Twin Peaks HMA have not in fact been inoculated  
24 previously.

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1           Although Plaintiffs appear to contend that the BLM failed to  
2 adequately respond to scientific studies that show the  
3 contraceptives to be more effective during their limited (up to  
4 two-year) period of efficacy (the BLM's scientists estimated up  
5 to 80 percent effectiveness, whereas Plaintiffs point to studies  
6 suggesting that the effectiveness might be closer to 100  
7 percent), the fact that the BLM chose to stand by its own  
8 estimates after acknowledging the information provided by  
9 Plaintiffs does not make the EA insufficient. An agency has the  
10 discretion to rely on the reasonable opinion of its own experts  
11 (Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989)),  
12 and agencies are accorded particular deference with respect to  
13 scientific issues within their area of expertise. See Sw. Ctr.  
14 for Biological Diversity v. Bureau of Reclamation, 143 F.3d 515,  
15 523 (9th Cir. 1998). Because the EA has given a thorough and  
16 reasoned explanation for its determinations, the expert analyses  
17 contained therein are entitled to substantial weight. See, e.g.,  
18 Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233,  
19 1244 (9th Cir. 2005). While Plaintiffs argue that the BLM had to  
20 respond explicitly and directly to the conflicting science they  
21 identified, the authority Plaintiffs cite applies not to an EA  
22 but instead to the more comprehensive EIS.<sup>4</sup>

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26           <sup>4</sup> While Plaintiffs argue that the obligation to respond to  
27 dissenting opinion in an EA is governed by 40 C.F.R. § 1502.9(b),  
28 that section is directed to the preparation of EISs, rather than  
EAs. The regulation governing environmental assessments, on the  
other hand, contains no such explicit command that all dissenting  
opinion be discussed. See 40 C.F.R. § 1508.9.

1           Moreover, while Plaintiff also claims that the EA's  
2 population modeling and foal rates are also inaccurate in  
3 predicting population growth, the fact that the July 26, 2010  
4 aerial population inventory came as close to the estimates using  
5 the disputed methodology as it did would appear to validate the  
6 integrity of the BLM's projections in that regard.

7           Plaintiffs' claim that riparian impacts were not thoroughly  
8 considered lacks merit as well. The EA contains an extensive  
9 discussion on the effects of wild horses and burros on riparian  
10 and wetland sites and explains how the BLM determined that  
11 certain of those impacts were attributable to wild horses and  
12 burros rather than livestock. See EA, pp. 57-65.

13           Finally, it must be emphasized that in an EA, an agency is  
14 not required to include the same level of detail, and the same  
15 depth of response, as for a full EIS. See Cal. Trout v. FERC,  
16 572 F.3d 1003, 1016 (9th Cir. 2009). Under 40 C.F.R. 1508.9, an  
17 EA is defined as a "concise public document....that serves to  
18 [b]riefly provide sufficient evidence and analysis for  
19 determining whether to prepare an environmental impact statement  
20 of a finding of no significant impact." An agency must go  
21 farther and prepare a full EIS only "if substantial questions are  
22 raised as to whether a project may cause significant degradation  
23 of some human environmental factor. LaFlamme v. FERC, 852 F.2d  
24 389, 397 (9th Cir. 1988).

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1 Here, following careful consideration of the impacts of the  
2 proposed action within a lengthy, 158-page EA, the BLM determined  
3 that an EIS was not necessary inasmuch as the requisite  
4 "significant impact" needed to trigger preparation of a full EIS  
5 was lacking. That conclusion appears well-reasoned and entitled  
6 to deference by this Court.

7  
8 **B. Irreparable Injury**  
9

10 Plaintiffs claim that the requisite irreparable injury is  
11 present here because horses will die in the course of the gather,  
12 and because, should the gather proceed, the reduced population of  
13 horses and burros will decrease their opportunities to view and  
14 appreciate the animals. Plaintiffs further claim that their  
15 ability to study free-roaming animals in their natural habitat,  
16 and within their particular family bands, will be impacted by the  
17 gather. Specifically, they point to their "specific and unique  
18 interest" in studying groups of individual living animals with  
19 their own "personalities, families, and histories." Pls.' Reply,  
20 19:25-28.

21 Plaintiffs' initial argument is premised on the fact that  
22 some horses died recently in the course of the recent Tuscarora  
23 Gather in Elko, Nevada. The BLM has produced evidence, however,  
24 that the relatively high mortality rates in that gather were due  
25 to pre-gather drought conditions at the Ownhee HMA. See Opp.,  
26 p. 46.

27 ///

28 ///

1 The same drought conditions are not present in the Twin Peaks  
2 HMA, a fact underscored both by pictures of robust looking horses  
3 contained within the EA (and also submitted by Plaintiffs) as  
4 well as photographs of apparently ample water sources within the  
5 HMA. Additionally, as outlined above, the EA provides that  
6 certain measures to protect the animals be employed, including  
7 gathering operations at less-than-stampede conditions during  
8 period of lower temperatures (despite Plaintiffs' often lurid  
9 predictions to the contrary). Although it appears inevitable  
10 that some horses will die as a result of the gather, it is  
11 equally certain that wild horses will suffer if their population  
12 is allowed to grow unchecked and food and water resources grow  
13 scarce.

14 With respect to Plaintiffs' abilities to still observe the  
15 horses and burros, the animals will still be present after the  
16 gather. The Court is unaware of any enforceable right to observe  
17 a particular number of animals, and it is sheer speculation that  
18 any particular individual or family unit will be affected.  
19 Moreover, and in any event, past experience shows that horse and  
20 burro populations will increase even if the gather proceeds. At  
21 the hearing, BLM estimated that even after the proposed gather,  
22 the wild horse population of the Twin Peaks HMA is still  
23 estimated to increase at approximately 18.5 percent annually  
24 after only four years.

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1 Under the circumstances, Plaintiffs have not shown a likely  
2 threat of irreparable harm, as they must in order to qualify for  
3 the extraordinary remedy of preliminary injunctive relief.  
4

5 **C. Balance of Hardships**  
6

7 The BLM has shown, rather convincingly in the Court's  
8 estimation, that currently ecological conditions, particularly  
9 when coupled with multiple-use mandates, cannot sustain the  
10 current population of horses and burros in the long run, which  
11 will only continue to grow absent significant intervention. As  
12 the EA estimates, populations are likely to increase as much as  
13 25 percent a year if no control measures are taken. EA, p. 95.  
14 This means, as the EA also points out, that wild horse population  
15 in the Twin Peaks HMA would exceed 6,000 to 8,000 head within ten  
16 years, based on application population increase estimates. Id.  
17 This is significantly in excess of the AML range for the horse  
18 population, at between 448 and 758. The BLM claims that it  
19 cannot protect and maintain the thriving natural ecological  
20 balance of the HMA in a multiple-use management plan involving  
21 both other species and other use objectives (as it is obligated  
22 to do under the Act) given the increases that will invariably  
23 occur if current population levels go unaddressed. The Act  
24 envisions that intervention will be necessary to protect the  
25 necessary balance; in fact, it goes so far as to authorize both  
26 sterilization and euthanasia. 16 U.S.C. § 1333(b).

27 ///

28 ///

1 Given the breadth of the congressional directive in that regard,  
2 as well as the Act's admonition that the BLM both protect and  
3 maintain the rangeland, it makes no sense to contend that it  
4 cannot take action to curb horse and burro populations before  
5 conditions become drastic due to overpopulation. Significantly,  
6 as the BLM informed the Court at oral argument, it estimates that  
7 a "crash" due to horse and burro population may occur by 2012 if  
8 nothing is done in the meantime. In the long run, reducing herd  
9 fecundity reduces intervention that may be necessary in the future.

10 Furthermore, as the BLM also points out, if it is unable to  
11 proceed with the gather this year, it is unlikely that a gather  
12 can occur for some time because of the limited number of  
13 contractors who have the qualifications and expertise to conduct  
14 gathers safely and effectively, and because of booked schedules  
15 of those contractors. See Defs.' Opp., 48-49. In addition to  
16 the delay, the cost will increase as the number of animals which  
17 must be removed will invariably increase.

18 The hardships Plaintiffs have identified, on the other hand,  
19 consist of largely intangible factors difficult to even properly  
20 quantify. Plaintiffs' alleged loss of relationships with  
21 particular horses and family groupings, as mentioned above, is  
22 little more than speculation. Moreover, some disruption to the  
23 social fabric of the herd appears inevitable inasmuch as even  
24 Plaintiffs conceded, at oral argument, that some effort to reduce  
25 horse and burro numbers would be needed (Plaintiffs' disagreement  
26 went instead to the timing of the present gather given their  
27 contention that the EA, as prepared, runs afoul both of the Act  
28 and of NEPA).



1 Plaintiffs' argument that the gather precludes their ability to  
2 observe and study truly wild horses that have never been subject  
3 to confinement also appears to be lacking inasmuch as BLM's plan  
4 anticipates that certain horses will never be captured during the  
5 course of the proposed operation. Finally, while the Court does  
6 agree that a certain number of animals will perish during the  
7 course of the round-up, as stated above it appears just as likely  
8 that significant numbers and horses and burros will die if their  
9 populations are allowed to increase to the point that food and  
10 water sources are no longer adequate. After weighing all these  
11 factors, the Court believes the balance of hardships favors BLM.  
12

#### 13 **D. Public Interest**

14


15 The Court believes the public interest is served in this  
16 matter by the BLM's management of the Twin Peaks HMA in  
17 accordance with federal law. Under the applicable Wild Free-  
18 Roaming Horses and Burros Act, as discussed above, the BLM is  
19 required to "immediately" remove horses determined to be excess.  
20 16 U.S.C. § 1333(b). The conclusion that the proposed gather is  
21 accordingly in the public interest, because the BLM has  
22 established that the HMA is overpopulated, is underscored by the  
23 decision in Salazar, supra. In that case, the court found that  
24 the public interest did not favor enjoining a gather where the  
25 BLM was legally required, under the Act, to remove excess horses.  
26 In Defense of Animals v. Salazar, 675 F. Supp. 2d at 98. That  
27 reasoning applies equally here, and the public interest weighs in  
28 BLM's favor as well.

1 **CONCLUSION**

2

3 As set forth above, Plaintiffs have demonstrated neither a  
4 likelihood of success on the merits, or a likelihood of  
5 irreparable injury sufficient to justify the extraordinary remedy  
6 of a preliminary injunction. In addition, the balance of  
7 hardships as well as the public interest appear to favor  
8 Defendants. Because the Court concludes that none of those four  
9 factors favor the Plaintiffs, they have not satisfied their  
10 burden under Winter, supra, to qualify for preliminary injunctive  
11 relief. Additionally, because the balance of hardships does not  
12 tip in Plaintiffs' favor at all, let alone strongly as the so-  
13 called sliding scale test requires, Plaintiffs cannot establish  
14 entitlement to an injunction under that alternative test, as  
15 recently reaffirmed by the Ninth Circuit in Alliance For Wild  
16 Rockies, supra. Plaintiffs' Motion for Preliminary Injunction  
17 (Docket No. 10) is accordingly DENIED.<sup>5</sup>

18 Dated: August 9, 2010

19 

20  
21 MORRISON C. ENGLAND, JR.  
22 UNITED STATES DISTRICT JUDGE

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24 <sup>5</sup> The Court notes that Defendants, as a preliminary matter,  
25 argue that Plaintiffs lack standing to contest the relocation of  
26 animals, on grounds that such relocation remains only speculative  
27 until after the gather was completed. In the Court's opinion,  
28 however, both the gather (with respect to which Defendants do not  
contest standing) and the animals' subsequent relocation are so  
inextricably intertwined as to render impossible any meaningful  
distinction between the two activities. Defendants' standing  
argument therefore lacks merit.